Martin Iron Works, Inc. *and* **Frank N. Deason.**
Case 31-CA-11930

22 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 11 April 1983 Administrative Law Judge William L. Schmidt issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We adopt the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(1) of the Act by discharging employee Deason. In so doing, we find it unnecessary to determine whether Deason's complaints to Respondent constituted protected concerted activity in view of our agreement with the Administrative Law Judge's finding that Deason was discharged for other unrelated reasons.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge: The hearing in this matter was held on January 4 and 5, 1983, at Las Vegas, Nevada. The proceeding is based on a charge filed by Frank N. Deason, an Individual (Deason), against Martin Iron Works, Inc. (Respondent), on February 25, 1982, and a complaint issued by the Regional Director for Region 31 of the National Labor Relations Board on April 19, 1982, which alleges that Respondent discharged Deason on September 25, 1981,[1] in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act). Respondent filed a timely answer which, as amended at the hearing, admits nearly all of the General Counsel's preliminary allegations but denies the commission of the alleged unfair labor practice. Hence, the sole issue is whether or not Deason's termination was unlawful.

Upon the entire record,[2] my observation of the witnesses who testified and my careful consideration of the post-hearing briefs filed by the General Counsel and Respondent, I hereby make the following:

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Relevant Facts*

Respondent, a Nevada corporation, is engaged in business as a steel fabricator and erector in the building and construction industry. It maintains its principal office and place of business in Reno, Nevada,[3] but the dispute here concerns its onsite operations at the so-called Anaconda-Molybdenum project located about 25 miles north of Tonopah, Nevada (the Tonopah job). Respondent was engaged as a subcontractor of the Bechtel Corporation at the Tonopah job, and it employed crews of employees skilled in the ironworker and millwright crafts. Respondent has maintained successive collective-bargaining agreements with a union representing its ironworker employees since 1939 and it appears that Respondent maintained jobsite agreements with unions representing millwright employees when it had a need for employees engaged in that craft. At Tonopah, Respondent agreed to be bound by an area agreement maintained by Millwrights and Machinery Erectors Local 1827 of Las Vegas (Local 1827).[4]

Respondent's Tonopah operation was under the general supervision of Project Superintendent William Zenz and, at the relevant times, Rene Genesse served as the millwright's general foreman.[5] At or about the time involved here, Respondent employed approximately 30 millwrights at the Tonopah job on 2 shifts of 15 men each. The millwrights were assigned to separate crews of four to six men and each crew was supervised by a foreman. During Deason's tenure on the Tonopah job, Allen Van Horn was his crew foreman. All of the millwrights,

[1] If not specified, the calendar year is 1981.

[2] The General Counsel's unopposed motion to correct the transcript is hereby granted. Said motion is hereby entered in the record of this matter as G.C. Exh. 1(i).

[3] The complaint alleges and the answer admits that Respondent annually purchases and receives goods or services valued in excess of $50,000 directly from suppliers located outside the State of Nevada. Accordingly, I find Respondent was, at all relevant times, an employer within the meaning of Sec. 2(2) of the Act which was engaged in commerce or a business affecting commerce within the meaning of Section 2(6) and (7) of the Act. I further find that it would effectuate the purposes of the Act for the Board to exercise its jurisdiction in this dispute.

[4] Local 1827 was, at the material times, a labor organization within the meaning of Sec. 2(5) of the Act.

[5] Zenz' background was as an ironworker. Zenz testified that he was not thoroughly familiar with the millwright craft and, as a consequence, relied heavily on Genesse for matters involving the millwrights at the Tonopah job.

including Genesse, were referred from or cleared through the Local 1827 office.

Deason was referred to the Tonopah job on September 16. Between September 16 and 20, Deason complained about a variety of job conditions and practices which concerned safety, the chain of supervisory command, and the proclivity of supervisors to perform unit work. More specifically, Deason pointed out an inadequate temporary covering being used in place of a floor grate to one of the Bechtel safety engineers. On another occasion, Deason challenged Genesse and a Bechtel engineer concerning the inadequacy of rigging being used to move a particular piece of machinery.[6]

It is undisputed that Deason complained repeatedly about Genesse's habit of performing manual labor. For example, Deason recalled that on one occasion, he observed Genesse carrying a box of bolts from the warehouse to the mill building where they were working and that on another occasion he observed Genesse grouting around one of the mills. Before he was fired, Deason made open threats to bring internal union charges against Genesse. The evidence shows that Genesse, a longtime union member, was concerned about these threats.

There is also evidence that Deason was vociferous about the lack of any chain of command on the jobsite. In this connection, Deason recounted an incident on September 20 when his partner and himself had their foreman's work instructions countermanded by a Copper's engineer and, a short time later, that instruction was changed by a Bechtel engineer. While Deason and his partner were taking measurements ordered by the Bechtel engineer, the particular machine was set down and Deason and his partner were nearly injured. This incident upset Deason considerably and he refused—in the presence of the Bechtel engineer—to follow any further instruction from anyone other than his own foreman. When the engineer indicated that he could not understand Deason's obdurate attitude, Deason explained his belief that he was nearly injured because others nearby were not aware of his presence and suggested that there should be a single foreman for the crew on each mill who would be responsible for all of the instructions flowing to that crew. Apparently as a result of this encounter, Genesse came to believe that Deason was going over his head to become either a crew foreman or to replace him as the general foremen.[7]

The incident advanced by Respondent as the cause of Deason's termination also occurred on September 20. Deason and his working partner, Bill Furry, were assigned by Genesse to assist the rigging crew in lifting the bearing pedestals for one of the mills so that shims could be placed beneath the pedestal in order to facilitate cleaning work. The rigging crew was supervised by Kenny Armstrong and consisted of three workmen. The task involved two preliminary steps: (1) lifting the mill with hydraulic jacks, and (2) lifting the pedestals with the overhead crane and a special rigging device. It is undisputed that the overhead crane (which was operated by Otto Atterberry, one of the rigging crew members) was inadequate to lift the combined weight of the mill and a pedestal. Genesse testified that was the responsibility of Deason and Furry to jack the mill. According to Deason, the mill was already jacked up when he arrived at the assigned work area.[8] Work proceeded at the discharge end of the mill without incident.

Thereafter, the crew moved to the feed end of the mill to continue their work. After the rigging was attached to the pedestal, Deason mounted the mill for the purpose of attaching to a piece of angle iron being used as a lifting lug and centering the lifting line over the load. When he had attached the hook, Deason signaled Jim Surrett (one of the rigging crewmen who was acting as a flagman for the overhead crane operator) to pull the line snug. According to Deason, the crane "lurched up fast" when the operator was signaled to snug up the line. Deason attributed this surprising occurrence to a defect in the slow "up" mode of the crane's controls which prevented precise operation. Genesse asserted that Deason told him he heard the pedestal hit or come in contact with the mill when the lurch occurred. In any event, Deason dismounted the mill and further signals were relayed to the crane operator to lift the load. The tug (or tugs) which followed was sufficient to rip the chokers loose from the lifting lug and they were hurtled approximately 40 to 50 feet through the air before they struck the side of an adjacent mill.[9] No one disputes Deason's claim that serious, or perhaps fatal, injuries could have resulted if anyone had been hit by the flying chokers. Genesse was not present when this incident occurred but did arrive back in the area shortly afterward. Genesse testified that Deason was very agitated; that Deason was shouting and yelling at him. Deason testified that he remarked to one of the Bechtel engineers who had observed the incident that it was some more of the "safe shit."

Genesse blamed Deason for the aforedescribed incident. According to Genesse, Deason admitted to him after he (Genesse) arrived back at the area that he had given a second and a third signal for the crane operator to lift the load after hearing the pedestal come in contact with the mill. According to Genesse, it was a "capital sin" for Deason to give the second signal after hearing the pedestal hit the mill following the initial signal to lift. Deason denied that he heard the pedestal hit the mill or that he ever told Genesse that it had. Deason testified that, after the initial upward lurch, he dismounted the mill and told Surrett to "go ahead and do what [you want] to do," or "Do as you want." The inference clear-

[6] Deason was not on the crew using the rigging. Genesse eventually told him to mind his own business in connection with this interchange.

[7] Nevertheless, Genesse agreed that there were too many people on the job who felt they were in the position to give orders. Genesse testified that "if you got aggravated or annoyed because somebody came to you and said do this or do that you were annoyed all day . . . . [O]ne time I remember counting 19 yellow hats on the job site [and] all of them wanted to tell me what to do." Sometime after Deason's termination, Genesse quit his job and the inference suggested by his testimony is that he did so, in part, because he was simply fed up with the massive overdirection of the work.

[8] Deason testified that he asked one of the rigging crewmembers if the mill had been jacked up and received an affirmative response. Armstrong was standing nearby and nodded his affirmance.

[9] There seems to be no dispute about Genesse's assertion that, after the initial lurch at the feed end, the pedestal was in contact with the mill and the combined weight of the mill and pedestal was too much for the crane and rigging to lift. Instead a portion of the rigging broke.

ly intended from Deason's testimony is that the accident occurred when Surrett gave a further signal for the crane operator to lift. Deason testified that after the accident he checked the hydraulic jacks and observed that the mill had not been raised enough. Deason blamed that situation on rigging Foreman Armstrong.

The first person informed of Genesse's decision to terminate Deason was the Local 1827 steward, Chester Reed. According to Reed, Genesse told him on September 21 that he was going to "lay Frank Deason off for raising hell and going over his head to . . . attempt to become . . . foreman." Reed testified that he then accompanied Genesse to Deason's workplace and that he informed Deason that he was being terminated. Reed said that Genesse told Deason at this time that he was being terminated because "he [Deason] went over his head in an attempt to become foreman by contacting the Bechtel engineers, and [that] he had also been responsible for [the] incident that happened the preceding day when [the] choker broke." According to Reed, Deason denied any responsibility for the accident and derided Genesse for such an accusation because his safety was also jeopardized by the incident. Additionally, Reed said that Deason explained to Genesse that he was not soliciting a foreman's job, that he simply thought the job would run smoother with another foreman. It is undisputed that, following Deason's protestations, Genesse agreed to "reconsider" Deason's termination.

Genesse testified that, after he carefully thought about the accident, his belief that Deason was responsible for the September 21 accident was reinforced and he concluded that he was being unfair to the other workmen by retaining Deason. Reed testified that he was told of Genesse's final decision to terminate Deason by Foreman Van Horn early in the morning on September 25. Reed said he then accompanied Van Horn to Deason's work area to inform him of his termination. After telling Deason he was being laid off, the three men stepped to one side and spoke with Genesse. Reed said that Genesse told Deason at this point that he had not received any complaints about his work and that he was being laid off because Lyle and Moe (two Becthel engineers) wanted Genesse to lay Deason off. At this point, Deason, Reed, Van Horn, and Genesse set out to find the two engineers implicated in Deason's termination but they soon learned that neither of the two engineers was on the job at that time. However, the group did locate Darrell Donnelly, the chief Bechtel engineer for the mill, and Donnelly told the group that as far as he was concerned the whole matter was the internal affair of Respondent and that Bechtel was not going to be involved in it. Reed said that Genesse persisted at this point in his determination to terminate Deason, so the entourage next proceeded to the trailer which housed the office of Respondent's superintendent, William Zenz. According to Reed, Genesse explained to Zenz that he was laying Deason off for "raising hell and agitating." Zenz replied that, as far as he was concerned, "raising hell" alone was enough reason to terminate someone and that he would not interfere with Genesse's determination.[10] Zenz provided Deason with his final check and Deason left the job. Deason was never reinstated.

Genesse acknowledged that he told the assembled group on the morning of September 25 that the two Bechtel engineers had "recommended" that he get rid of Deason. Genesse then volunteered that he also told Deason that he "played the game and he knew how the game was played." Asked to explain the meaning of that remark, Genesse testified:

> He played the game. He went around, he asked to be made foreman, to the Bechtel people.
>
> He, as far as my own conclusion, eventually created an accident so I would be laid off and he would be made foreman.
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> * * * * *
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> And this is the conclusion that I used to eventually lay him off because he was able, in his goal to achieve foreman's work, pay or job, to create an accident to achieve that goal, he was able to create two accidents. And nobody can watch a man 24 hours a day. I can't do it, and nobody can either. And if an accident is prepared during the day and happened at night, these people are completely innocent of what is going on. I could not take that chance.

B. *Additional Findings and Conclusions*

Respondent argues that the "motivation" behind Deason's discharge was his dereliction in connection with the September 20 accident and his "insubordinate" attempts "to be made general foreman." For this reason, Respondent argues that the General Counsel has failed to prove that Deason's discharge was caused by any of Deason's protected activities and requests that the complaint be dismissed.

The General Counsel argues that Respondent's contention that Deason's discharge resulted from the September 20 accident is a pretext and the fact that Respondent proffered a pretextual defense is a significant additional reason for inferring that Deason's discharge was unlawfully motivated. In the alternative, the General Counsel asserts that in the unlikely event it is concluded that the reason proferred for Deason's termination by Respondent is not a pretext, the evidence in the case still merits the conclusion that it was Deason's protected activity which was the motivating cause for his discharge and that Respondent failed to prove that Deason would have been discharged notwithstanding his protected activity. Accordingly, the General Counsel urges that I find that Respondent violated Section 8(a)(1) of the Act, as alleged.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer:

[10] Notwithstanding certain documentary evidence and Zenz' own testimony, his role in Deason's termination was clearly secondary and limited almost entirely to ratify Genesse's conduct. For this reason, I do not find Zenz' testimony particularly relevant in determining the actual motive for Deason's termination.

> . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

Section 7 of the Act provides, *inter alia*, that:

> Employees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.

An employer is not at liberty to punish an employee by discharging him for engaging in concerted activities protected by Section 7 of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). Deason's protests concerning safety matters, Genesse's performance of unit work, and the lack of an appropriate chain of command pertained to working conditions in general at the Tonopah job and, for purposes of the discussion here, it has been assumed that they were activities protected by Section 7 of the Act. *NLRB v. Modern Carpet Industries*, 611 F.2d 811 (10th Cir. 1979); *Farmland Soy Processing Co.*, 263 NLRB 237 (1982), modified at 265 NLRB No. 118 (1982). Ultimately, the Geenral Counsel has the burden of proving by a preponderance of the credible evidence that Deason's discharge was for an unlawful reason. *Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Accord: *Zurn Industries v. NLRB*, 680 F.2d 683, 686-693 (9th Cir. 1982). But cf. *Royal Development Co. v. NLRB*, Nos. 81-7638 and 81-7736 (9th Cir. Feb. 22, 1983). For the reasons set forth below, I have concluded that the General Counsel has failed to meet the required burden here and, accordingly, it is recommended that the complaint be dismissed in its entirety.

Respondent is an employer with a long history of adherence to the principles of collective bargaining and there is no evidence that it developed a sudden animus toward the practices and procedures of collective bargaining during the course of the Tonopah job. On the contrary, even after Deason's discharge, it appears that Respondent voluntarily met with the Local 1827 in an effort to resolve the grievance which Deason filed over his discharge.[11] In addition, Genesse, the individual responsible for discharging Deason, was essentially a long-time union craftsman who served as the general foreman on the Tonopah project only after Respondent's need for an expanded workforce developed. The atmosphere discernible from the foregoing observations is that neither Respondent nor its responsible supervisor harbored a visceral hostility toward the exercise of employee rights.

Certain of the testimony and evidence supports the inference the General Counsel has made, namely, that Deason was discharged for "raising hell and agitating" and that, as used here, those ambiguous terms referred to Deason's protected activity. Aside from such remarks, a carefuil examination of the evidence discloses that the General Counsel's case lacks a strong causal connection—other than timing—between Deason's protected activity (his complaints about safety and the supervision) and his discharge. However, because of Deason's short tenure, timing is not a significant factor in this case. Deason was employed by Respondent for only 9 days and his discharge was initially announced on the sixth day of his employment. Paraphrasing Genesse, if Deason's protected complaints were the reason for his discharge, he would have been discharged even sooner. Furthermore, Genesse's acknowledged concern over the threat to bring internal union charges against him do not appear to extend beyond the concern one would expect of a long-term union craftsman.

By contrast, there is a strong causal connection between the events of September 20 and Deason's discharge. As the quoted testimony of Genesse in section III, A, shows, Genesse concluded that Deason deliberately caused the accident on September 20 in furtherance of an effort to embarrass Genesse and eventually replace him as the general foreman. Genesse's testimonial assertion that he believed that Deason was the direct cause of the accident is clearly not an afterthought. Both Reed and Deason acknowledged that Genesse made such an assertion when he first attempted to discharge Deason on September 21. That fact together with the impression I gained from observing Genesse on the witness stand that he was attempting to testify as candidly and as honestly as his memory would permit has led me to conclude that Genesse was sincere in his belief that Deason had deliberately caused the accident with the chokers. Having so concluded, I further credit Genesse's denial that Deason's earlier gripes about safety and job supervision (Deason's protected activity) led him to discharge Deason. On the basis of all of the evidence, I am convinced that Genesse discharged Deason as an act of self-preservation as he, in essence, asserted. Insofar as Genesse was concerned, Deason's ambition to displace him as the general foreman was so strong that Genesse could not trust Deason. When Genesse became convinced that Deason's ambition was so excessive as to be dangerous to the other workmen, he discharged Deason. Having concluded that Genesse was sincere in this belief, regardless of whether he was right or wrong, it logically follows that Genesse's motive in discharging Deason involved a matter which is not unlawful under the Act. Accordingly, I find that Respondent did not violate Section 8(a)(1) of the Act by its September 25 discharge of Deason.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On or about September 25, 1981, Respondent discharged Frank N. Deason and since said date Respondent has failed and refused to reinstate Deason to his former position.

4. The General Counsel has failed to establish by a preponderance of the credible evidence that Respondent's conduct specified in paragraph 3, above, violated the Act.

Pursuant to Section 10(c) of the Act, and upon the foregoing findings of fact, conclusions of law, and the entire record herein, I hereby issue the following recommended:

[11] As Deason noted, the memorandum agreement in effect between Respondent and Local 1827 specifically excluded the grievance procedures in the area master agreement from application at the Tonopah job.

ORDER[12]

It is hereby ordered that the complaint be, and the same hereby is, dismissed in its entirety.

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes. All outstanding motions inconsistent with the recommended Order here are denied.